

Jang Hyun Jo v Ouidir
2018 NY Slip Op 30473(U)
March 20, 2018
Supreme Court, New York County
Docket Number: 156494/15
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22**

JANG HYUN JO,

Plaintiff,

-against-

ISLEM OUIDDIR and TW CHAUDHRY, LLC,

Defendants.

DECISION/ORDER

**INDEX NO. 156494/15
MOTION SEQ. NO. 002**

ADAM SILVERA, J. :

Plaintiff commenced this action to recover damages for injuries allegedly sustained in an automobile collision that occurred on 7th Avenue, near its intersection with West 21st Street in New York, New York. On April 27, 2015, plaintiff, riding a bicycle near the intersection, was struck by a car door opened by defendant Islem Ouiddir. Plaintiff’s bill of particulars states that he suffered serious injuries to his back, neck, right leg and knee, left elbow and hand. Plaintiff alleges that defendants’ negligence and/or recklessness make them liable for his injuries.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff’s alleged injuries did not reach the threshold of “serious injury,” as required by §5102(d) of the Insurance Law, to allow him to maintain a lawsuit such as this one.

In examining the evidence, defendants argue that plaintiff has not demonstrated that he suffered serious injuries as a result of the collision. They submit plaintiff’s deposition transcript, dated May 9, 2016. Plaintiff testified that he missed 3 days of work as a result of the accident, that his last visit to a physician was in 2015, and that he was confined to his home intermittently. Defendants submit medical affirmations from a neurologist, Dr. Naunihal Singh; an orthopedist,

Dr. Arnold Berman; and a radiologist, Dr. Robert Tantleff. Dr. Singh examined plaintiff on June 6, 2016, and concludes that there was no objective basis for plaintiff's continual subjective complaints, and that plaintiff does not exhibit any functional disabilities. After subjecting plaintiff to a number of tests, Dr. Singh asserts that plaintiff presently experiences a normal range of motion with respect to his injured body parts. Dr. Singh's test results are included with his affirmation.

Dr. Berman examined plaintiff on July 14, 2016, using a goniometer to measure the range of motion of plaintiff's body parts, and performing a battery of tests. Dr. Berman's results are similar to those of Dr. Singh, indicating that plaintiff is able to perform all of the activities of daily living without signs of restriction.

Dr. Tantleff affirms that he reviewed plaintiff's MRI films with respect to plaintiff's lumbar spine and right knee, recorded six weeks after the date of the accident. Dr. Tantleff opines that the lumbar MRI showed preexisting degeneration with no findings related to the accident, and that the right knee MRI showed no findings related to trauma.

Defendants argue that there is sufficient medical evidence to demonstrate the lack of any serious injuries as defined in §5102(d) of the Insurance Law. They claim that based on objective proof, plaintiff's injuries are likely the result of pre-existing conditions not related to the accident. In the absence of any issue of fact, defendants request the grant of their motion.

In opposition, plaintiff argues that there are issues of fact precluding the grant of this motion. Plaintiff contends that the medical affirmations are too conclusory and incomplete in their assessment of his present condition. Moreover, plaintiff states that these physicians did not read or analyze his own medical records before presenting their findings. Plaintiff contends that their failure to review all of the available information indicates a faulty evaluation of his injuries.

For example, plaintiff avers that Dr. Berman's statement concerning plaintiff's right knee, as "resolved," was premature, as plaintiff underwent right knee arthroscopy several months after Dr. Berman's evaluation.

Plaintiff submits an affirmation of radiologist Dr. Jacob Lichy, who examined the MRI film of his cervical spine, and an affirmation of radiologist Dr. Thomas Kolb, who examined plaintiff's MRI film of his right knee. Also submitted are detailed reports from anesthesiologist Dr. Jinghui Xie, who first treated plaintiff on May 22, 2015, offering his findings based on several examinations, as well as his review of plaintiff's MRI films. Dr. Xie concludes that plaintiff continues to suffer continual pain, tenderness and discomfort to his cervical spine, lumbar spine and right knee.

Plaintiff also submits an affirmation from Dr. Thomas Scilaris, who specializes in rehabilitation medicine and therapy. Dr. Scilaris first examined plaintiff on June 25, 2015. Plaintiff underwent a battery of tests performed by this physician, who also performed the right knee arthroscopy. Dr. Scilaris affirms that his last examination of plaintiff took place on December 12, 2016. He concludes that, at present, plaintiff suffers a permanent injury to his right knee, as a result of the accident, which represents a significant limitation of use. Specifically, Dr. Scilaris states that plaintiff will be limited in his capacity to stand, climb, lift and carry objects, and walk for prolonged periods of time, and that this was not the case prior to the accident.

Plaintiff contends that this evidence clearly contradicts the findings of defendants' physicians. Plaintiff also contends that defendants failed to make a prima facie showing for summary judgment in the first place, by proving the absence of serious injury.

In reply, defendants argue that their physicians provided a thorough examination of plaintiff, using standard objective procedures, to conclude that plaintiff does not suffer from

serious injuries. Defendants contend that it is not essential to their motion that their physicians review plaintiff's prior medical records. Defendants refer to plaintiff's deposition testimony, where he admits to being employed full time after the accident, with the exception of three days off. Defendants state that this testimony precludes plaintiff from alleging the statutory threshold for the 90/180 day category of serious injury. According to defendants, plaintiff was able to perform substantially all of the material acts which constitute his usual and customary activities for 90 out of 180 days after the accident.

Defendants argue that plaintiff should have provided more recent medical reports, particularly further in time from the surgery from which he was recovering. Also, defendants claim that plaintiff failed to respond to the preexisting injury issue, except in a conclusory manner. Finally, defendants contend that the specific physical abnormalities asserted by plaintiff in his papers are not sufficiently shown to be serious injuries for purposes of the Insurance Law.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law". *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dep't 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'". *People v Grasso*, 50 AD3d 535, 545 (1st Dep't 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *See Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dep't 2002).

Courts have continually held that the question of whether a plaintiff has established a prima facie case for a “serious injury,” as described in §5102(d) of the Insurance Law, remains an issue of law. *See Licari v Elliott*, 57 NY2d 230, 235 (1982). Claims of serious injury are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident. *See Pommells v Perez*, 4 NY3d 566, 574 (2005).

In opposition, plaintiff proffers his deposition testimony, and affirmations from Dr. Xie and Dr. Scilaris, both of whom have been treating plaintiff’s injuries. According to his deposition testimony, plaintiff sought and received various therapies for his right knee, lower back and neck at the Apply Pain Clinic. He received neck injections from Dr. Xie, who worked at the clinic. He was told by Dr. Scilaris to have right knee surgery due to a tear on his knee. At the time of his deposition, plaintiff testified that he continued to suffer pain in his back, neck and right knee, that he could not sit for a prolonged period of time or bend down without experiencing pain, and that he had traumatic “fear” about riding a bicycle.

The evidence provided by Dr. Xie, who affirmed that he performed several objective tests on plaintiff, including range of motion exams, indicates an opinion that plaintiff currently suffers from permanent and significant injuries to his neck, back and right knee which are causally related to the accident. He provides extensive findings as to a restriction of limitation of movement, and confirms residual and continual physical pain with respect to plaintiff’s affected body parts. Dr. Scilaris also provides evidence of his own tests and the results of the surgical procedure he performed on November 23, 2016, concluding that plaintiff’s right knee is subject to a permanent disability.

Where a plaintiff’s physician asserts a permanent injury and sets forth the findings upon which he expresses his opinion, such evidence is sufficient for denying summary judgment to a

defendant. *See Lopez v Senatore*, 65 NY2d 1017, 1020 (1985). The court finds that plaintiff has established issues of fact precluding summary judgment. The evidence he submitted includes extensive and objective medical reports that indicate significant, if not permanent, limitation of the use of plaintiff's body parts, particularly his right knee. The court also finds that enough evidence has been provided to raise an issue as to the relevance of preexisting injuries as applied in this case. Plaintiff's physicians have demonstrated a factual rebuttal to the conclusions reached by defendants' physicians. Thus, issues of fact as to the extent of plaintiff's present physical state remain to be resolved.

Accordingly, it is

ORDERED that defendants Islem Ouiddir and TW Chaudhry, LLC's motion for summary judgment is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: March 20, 2018

MAR 20 2018

ENTER:



Hon. Adam Silvera, J.S.C.